1979

Enid B. Cosgriff et al v. George M. Schneiter et al : Brief of Respondents

Utah Supreme Court

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Thomas A. Quinn; Kent H. Murdock; Attorneys for Appellants;

IN THE SUPREME COURT OF THE STATE OF UTAH

ENID B. COSGRIFF, HAROLD M. ISBELL, RAINER M. DAHL, and THE CONTINENTAL BANK AND TRUST COMPANY, as Trustee for LYN C. ISBELL and PATRICIA C. DAHL, Respondents,	
vs.	Case No. 15943
GEORGE M. SCHNEITER, JoANN D. SCHNEITER, individually as custodian for STEPHEN D. SCHNEITER, DANIEL D. SCHNEITER, GEORGE D. SCHNEITER, ELIZABETH A. SCHNEITER and MICHAEL D. SCHNEITER, Appellants.	

RESPONDENTS' BRIEF

On Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
Honorable G. Hal Taylor, District Judge

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NATURE OF THE CASE

This is an action for declaratory judgment of the number of shares held by the shareholders of Lake Hills Golf Club, Inc. (Lake Hills), in which the defendants (Appellants), by counterclaim, seek reformation of the stock record books. At stake is control of the corporation.

JUDGMENT BELOW

The district court (Judge G. Hal Taylor, presiding) upon a two day non-jury trial entered findings of fact and conclusions of law in accordance with

Respondents' prayer and dismissed defendants' counterclaim. The court below heard the testimony of nine witnesses and received and considered approximately 40 exhibits.

RELIEF SOUGHT ON APPEAL

Respondents urge the Court to affirm the judgment below in all respects.

STATEMENT OF FACTS[1/]

The issue presented by this case is how many shares of Lake Hills, are owned by the Schneiter family (Appellants). The issue arises because while it is conceded that the Respondents as a group own 250-1/2[2/] shares, it was contended, beginning in 1975, by Appellants, that they owned 250-1/2 shares as well (see,

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1/ Respondents must restate the facts because Appellants' statement is not a fair reflection of the trial record. Appellants assert, for instance, that G. M. Schneiter (Schneiter Jr.) did not know the source of his original one share (App.'s Br. 3). But this is rebutted by the evidence that he was Secretary from 1957 (R. 142) until January, 1965 when his wife became Secretary in which position she continued until this controversy arose (Ex. 2). The Schneiters always controlled the stock record book. (R. 142, 145, 175; See also Ex. 13). Appellants assertion of representations of equal ownership rests upon the unsupported testimony of Schneiter Jr. and is indeed refuted, as shown infra.

2/ Schneiter Jr. on cross examination conceded as follows: "Q. Do you acknowledge that the Cosgriffs own 250-1/2 shares? A. Yes." (R. 143).

e.g., R. 110), "a legal impossibility" as Appellants only now concede (App.'s Br. 12). It is "a legal impossibility" because the Articles of Incorporation authorize only 500 shares (Ex. 2) and Appellants' contention would result in a total issue of 501 shares, or an over issue of one share.

As developed infra, this suit was begun by Respondents for declaratory judgment, when they learned of Appellants claim, to determine the number of shares owned by Appellants. (R. 136). Appellants claim to own 250-1/2 shares ultimately comes down to their contention that 83 = 84 (R. 148-150, 151) and their subsequent attempts so to obscure the record as to make the impossible appear plausible.[3/] Respondents suit for declaratory judgment thus sought a determination that Appellants owned, as a group only 249-1/2. The trial judge found in accordance with Respondents' prayer.

No one contests that in 1956 Walter Cosgriff, George Schneiter, Sr. and Ven Savage joined together to form Lake Hills. It is equally uncontested that the first three issues of stock were:

3/ Appellants in their brief, at 4, now assert that they own only 249-1/2 shares. But the evidence is clear that Schneiter Jr. claims 250-1/2 shares (R. 143) and there are certificates currently standing in the Schneiter family name in the amount of 250-1/2. (Ex. 3 and 4; R. 143).

Cosgriff		Schneiter		Savage	
	17		16		17
	17		17		16
	50		50		50
Total	84	Total	83	Total	83

There is no evidence, and indeed no contention, that any mistake was made in these first three issues, despite the fact that thereby Cosgriff owned one more share than the other two, and despite the fact that Cosgriff characterized these ratios as "one-third."[4/] This is but one instance of Cosgriff's careless use of such imprecise characterizations.

It is only the fact that Savage agreed to sell out to the other two that gives rise to a controversy. What is now clear, from Exhibit 13, is that Schneiter, Sr., the keeper of the stock record book, (R. 142, 175) knew exactly how many shares Savage had to sell and reported to Cosgriff that he was dividing these 83 shares 41-1/2 to Cosgriff, 40-1/2 to himself and 1 to his son.

No issue would be before the Court had the Schneiters' faithfully carried out this expressed intent. Instead they caused a certificate (Cert. # 11; Ex. 8) to be issued to Schneiter Sr. which read both "41-1/2" and "Forty and one-half" and they caused the stub in the stock

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4/ (Ex. 16). Indeed Cosgriff owned 33.6% and the other two owned 33.2% each, just a hairs'-breadth away from 33.33%.

record book (Ex. 3, stub 11) to read "4¢-1/2,"[5/]. There was also issued in 1957 one share to Schneiter Jr., which is clearly a transfer share from Savage's stock (Ex. 3, stub 12). The conflicting numbers on Certificate #11 and the stock record book (Ex. 3) later gave rise to the claim that 83 = 84, and thus to Appellants' claim to own 250-1/2 shares. It is equally clear from Exhibits 16 and 18 that Cosgriff paid exactly one-half and Schneiter exactly one-half of the total price for Savage's shares.

Following this buy-out, the corporation issued an additional 125 shares to each of Cosgriff and Schneiter, Sr. There is no claim that any mistake was made in this issue and there certainly is no evidence of mistake. So matters rested for 18 years during which time both Schneiter Sr. and Cosgriff died and their shares were distributed to their heirs.

In the years that followed, the Cosgriff family continued to furnish financial assistance to the corporation and the Schneiters continued in the day to day management. (R. 117). After both Walter Cosgriff and George Schneiter, Sr. died, Mrs. Cosgriff represented the

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5/ The figure 4¢-1/2 is correct; the zero had a line drawn through it. (R. 113, 127, 135-136; Ex 5). Schneiter, Jr.'s testimony, if it can be believed, was that he found the stock to so read after his father's death. But he also conceded the record book was exclusively in the Schneiters' control. (R. 142, 145).

Cosgriff interests on the Board of Directors (R. 109) and George Schneiter, Jr. took over the daily management responsibilities. Mrs. Cosgriff always understood that she and her family had control (R. 109) and the Cosgriffs had the final word on such things as Schneiter Jr.'s salary (R. 117, 201), despite the fact that Mrs. Cosgriff might have been technically out voted on the Board by Schneiter, Jr. and his wife. (R. 109, 201).

It was only in the Spring of 1975 that the Cosgriff family learned that Schneiter, Jr. contended that he and his family owned 250-1/2 shares of the corporation, a contention that, of course, requires the creation of an additional share out of thin air. Years earlier Mrs. Cosgriff had installed her brother, Robert Barr, on the Board and had transferred one of her shares to him so he would qualify as a shareholder-director. (R. 111). In 1975 Mrs. Cosgriff determined to turn over the directorial oversight to her sons-in-law, Harold Isbell and Rainer Dahl. (R. 130). She, therefore, in a meeting with Schneiter, Jr., Isbell and Barr asked Schneiter, Jr. to transfer the one share standing in Barr's name back to her. In response Schneiter, Jr. turned to Barr, offered to buy the share, and asked Barr to name his price. Barr, of course, refused saying the share represented control. Schneiter, Jr. thereupon insisted it did not. (R. 111, 121-122, 131). A few weeks later Schneiter, Jr. in a

conversation with Isbell insisted he owned 250-1/2 shares (R. 133) and indeed the Schneiters had certificates which on their face added up to 250-1/2. (R. 143).

These exchanges precipitated an examination (R. 112), for the first time, of the stock record book by the Cosgriff family and hence their discovery of the conflicting numbers in the stock records (R. 127, 131). The exchanges also prompted the Schneiters' attempt to improve their position by (a) obliterating the critical figure in the stock record book[6/] and (b) unilaterally increasing the capital stock account by $100 to $50,100,[7/] an increase which would reflect the issuance of 501 shares of stock.

In contradiction to this overwhelming evidence Appellants rely upon (a) some correspondence and conversation in which Mr. Cosgriff loosely and imprecisely characterized his relationship with Savage and Schneiter, (b) a letter of Schneiter, Sr.'s (Ex. 13), and (c) the testimony of Schneiter, Jr., all of which has been related in Appellants' Brief.

6/ Schneiter admitted blotting the figure after the Cosgriffs examined the stock record book. (R. 151-152).

7/ Exhibits 11 and 12, being balance sheets of the corporation for August and September 1975. This change was made at Schneiter, Jr.'s instance. (R. 159-161).

ARGUMENT

I. APPELLANTS' BURDEN WAS TO SHOW MUTUAL MISTAKE BY CLEAR AND CONVINCING EVIDENCE.

This case is a graphic illustration of the wisdom of a very basic and profound standard of this Court; that is, that mutual mistake sufficient to warrant reformation must be established by clear and convincing evidence.

> Evidence necessary to substantiate the mutual mistake of fact must be clear, definite and convincing, and the party seeking reformation should not be guilty of negligence in the execution of the contract. . . . or laches in making timely application for the reformation. This principle has consistently been applied in equity throughout its reformation of instrument cases.
> Naisbitt v. Hodges, 6 Utah 2d 116, 307 P.2d 620, 623 (1957).

See also Peterson v. Eldredge, 122 Utah 96, 246 P.2d 886 (1952).

This rule is especially salutory in a case where one party seeks to reform an agreement made over 20 years ago when the only people who could testify as to intent are both long dead, and where the written record is itself scanty. It should also be pointed out that the Schneiters' own conduct created whatever confusion now exists, and that they were content to rest on that confusion for nearly 20 years.

To have awarded reformation the district court would have had to ignore this rule of law. Indeed the court below would have had to rely on evidence which,

taken as a whole, would not warrant reformation under any standard of proof.

II. APPELLANTS HAVE NOT ESTABLISHED MUTUAL MISTAKE BY CLEAR AND CONVINCING EVIDENCE.

Appellants' nowhere in their brief cite a single line of evidence that Walter Cosgriff intended to acquire less than one-half of Savage's stock. Equally, there is no evidence that Walter Cosgriff ever intended to permit Schneiter, Jr. to buy a single share of treasury stock. (See footnote 4 on p. 9 of their brief where Appellants make this suggestion).

Respondents suggest a review of the exhibits (including those not received, but now relied upon by Appellants) in chronological order for the period before and up to the date of the Savage buy-out. They are Exhibits 14, 15, 16, 13 and 19.

Exhibit 14 is Cosgriff's and Schneiter's joint letter to Savage proposing to Savage that he either acquire Cosgriff's and Schneiter's stock or sell his stock. In that letter Cosgriff and Schneiter proposed to Savage that "you then agree to sell us your stock. . .costing $100.00 a share or a total price of approximately $8,333.33 at a $15,000.00 profit, or a purchase price of $23,333.33".

Also, on that same date, Cosgriff prepared Exhibit 15 addressed to Savage advising him that the corporation needed $25,000 additional capital and that the

three shareholders should have a right to purchase "our pro rata share" and that "each of us would have to put up $8,333.33". The letter further provided for Savage to assign his interest to Cosgriff if Savage was not willing to advance the additional funds required. Schneiter on Exhibit 15 accepted this assignment.

A few days later, by Exhibit 16, Cosgriff wrote Schneiter to advise Schneiter that he had paid Savage $23,300 "covering the purchase apparently of 83 shares . . . representing his approximate one-third interest." Cosgriff went on to write "you would want and would expect to put up half of this money so that we would each own a 50% interest."

The most favorable inference for Appellants' from this correspondence is that (a) Cosgriff and Schneiter believed when Exhibits 14 and 15 were written that Savage owned approximately 83-1/3 shares, (b) a few days later when Cosgriff wrote Exhibit 16 he had learned that Savage owned 83 shares which represented an approximate one-third interest and (c) Cosgriff offered Schneiter the opportunity to acquire half of Savage's stock apparently thinking this would result in an equal division of the stock.

Unfortunately for Appellants the more plausible inference that could be drawn from the evidence was that

Cosgriff never cared about exact equivalents, but was only thinking in approximations. This latter inference is supported by the way in which the first three issues of stock were handled. Thus, in the first issue Schneiter got 16 shares while the other two got 17 each. In the second issue Savage got 16 and the other two 17 each. Thus, Cosgriff owned one more share than the other two. In the third issue of stock, no attempt was made to rectify the inequality, the parties obviously not being concerned about such an exactitude as is only now asserted by Appellants.

Nearly a month later, on October 10, 1957, Schneiter wrote to Cosgriff, Exhibit 13. In that letter, the person who kept the stock record book wrote that Savage's shares were being divided 41-1/2 to Cosgriff, and 41-1/2 to Schneiter, Sr. out of which Schneiter, Sr. was assigning one share to Schneiter, Jr., "thinking that you [Cosgriff] would probably prefer to maintain fifty percent interest." Exhibit 19 demonstrates that Schneiter paid exactly one half of the purchase price for Savage's stock.

Thus, the only intent clearly expressed by both parties to the transaction was that Savage's 83 shares be paid for and divided equally. There is no hint that these good friends (R. 163) were concerned about maintaining equality of shareholdings with exactitude. (Indeed

Schneiter, Sr. by his acceptance of the terms of Exhibit 15 was prepared to see Cosgriff acquire a very substantial majority position.) The use of such terms as "one third," and "50%" were merely used as approximations. These documents do not amount to clear, definite and convincing evidence that the result sought was exact equality of ownership. The other evidence cited by Appellants does not add anything to their contention. Walter Cosgriff's offhand statements of equal ownership are again merely approximations. Very few of us would differentiate between 50.0% and 50.1% when describing, in casual conversation, a business relationship with a good friend. Indeed some of this evidence cited by Appellants is quite incredible and could not have been believed by the trier of facts.[8/]

In summary the evidence before the trial court is susceptible of two inferences: first, that Cosgriff was speaking loosely and did not intend anything more than an approximation of one-third or one-half; and second, that Cosgriff was in error in assuming that the equal division of Savage's stock would result in exact equality between him and the Schneiters. However, either inference could

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8/ For instance Schneiter, Jr. testified that Walter Cosgriff in the same conversation in which he mentioned equality also promised to give up his valuable investment free of charge to the Schneiters. (R. 167, 169, 197).

be drawn by the trier of facts. There is no compelling reason to draw the inference urged by Appellants. Because of this, Appellants have failed to establish their counterclaim by clear and convincing evidence. The judgment below should be affirmed because the evidence does not clearly preponderate against the finding of the trial judge. Provo City v. Lambert, 574 P.2d 727, 730 (Utah, 1978).

III. THERE IS NO EVIDENCE OF SUCH MUTUAL MISTAKE AS WOULD WARRANT REFORMATION.

Let us assume arguendo that the only permissible inference from the evidence is that Cosgriff believed an equal division of Savage's stock would result in exact equality between himself and the Schneiters. Even in this instance Appellants would not be entitled to reformation.

Reformation is typically appropriate where the parties agreed orally to a term, but the written contract either omits the term or contains a contradictory term. That is to say, there must be a pre-existing agreement not reflected in the writing.

Professor Corbin in his treatise on contracts states the general requirement for reformation, the existence of a pre-existing agreement, as follows:

> Whatever may be the form of the transaction ... and whatever may be the explanatory theory as to when and how the contract became binding, a court will not decree reformation unless it has convincing evidence that the parties expressed agreement and an intention to be bound in

> accordance with the terms that the court is asked to establish and enforce. 3 Corbin on Contracts, § 614 at 725 (1960).

In State v. Ashton, 4 Ariz. App. 599, 422 P.2d 727, 730 (1967), this same rule is stated as follows:

> To entitle one to reformation, it is essential to show that a definite intention on which the minds of the parties had met pre-existed the written instrument and that the mistake occurred in its execution. Greenfield v. Aetna Casualty & Surety Co., 75 Ohio App. 122, 61 N.E.2d 226 (1944). If the minds of the parties had not met in a prior agreement, there is nothing to be corrected. 76 C.J.S. Reformation of Instruments 18.
>
> The Utah rule is no different.
>
> The right to reform is given, at least in part, so as to make the written instrument express the bargain the parties previously orally agreed upon. When a writing is reformed the result is that an oral agreement is by court decree made legally effective although at variance with the writings which the parties had agreed upon as a memorial of their bargain. Bench v. Pace, 538 P.2d 180, 182 (Utah 1975).

See also Naisbitt v. Hodges, 6 Utah 2d 116, 307 P.2d 620, 623 (1957).

In the case at bar the precondition to reformation has not been shown. There is no evidence of any prior agreement. The only evidence of the intent of either party to the transaction is that the Schneiters were to get 41-1/2 shares of Savage's 83 shares. (Ex. 13). There is, therefore, no basis at all for reformation.

That the result of this transaction was not to effect an exactly equal division of shares does not

advance Appellants' position, even if it could be found that the parties intended that result. Percival v. Cooper, 525 P.2d 41 (Utah 1974). In Percival the parties each believed they were dealing with a half-acre parcel. The deed given, however, described the lot as a rectangle measuring 114.5 feet by 165 feet, or slightly less than a half-acre. Apparently in Percival, as here, simple mathematics were not applied. This Court, in Percival, refused to reform the deed even though there was clear and convincing evidence the parties believed they were conveying a half-acre. Similarly here there should be no reformation.

Appellants' argument is, in essence, that the agreement reached by Schneiter and Cosgriff was based on a mistaken belief of the pre-existing facts, the number of shares owned by each. In effect Appellants urge that a different agreement might have been reached had the parties been more accurately informed. But the court cannot now reform the documentation of their agreement, even if the agreement was entered into based upon a mistake of fact, since the mistake occurred prior to their agreement. Professor Corbin in his treatise on contracts elaborates on the requirement that the mistake justifying reformation must occur after the agreement is reached.

> If two parties are caused to enter into a contract by reason of their common ignorance or common mistake as to some fact, but for which they would have not agreed, this may

> be ground for rescission, but it is not ground for reformation. Proof of such a mistake as this does not show that the parties have ever expressed assent, orally or otherwise, to any contract other than the one written. That writing truly expresses the only terms on which they have agreed. It may be subject to rescission for mistake; but there is no other agreement in accordance with which it can be "reformed." 3 Corbin on Contracts, § 614 at 728 (1960).

Willison states a similar rule:

> Still more clearly, if, because of mistake as to an antecedent or existing situation, the parties make a written instrument which they might not have made, except for the mistake, the court cannot reform the writing into one which it thinks they would have made, but in fact never agreed to make. 13 Williston on Contracts, § 1549 at 134 (1970).

See also Russell v. Shell Petroleum Corporation, 66 F.2d 864, 867 (10th Cir. 1933), where the Court said:

> To justify reformation on the ground of mistake, the mistake must have been made in the drawing of the instrument and not in the making of the contract which it evidences. Robinson v. Korns, 250 Mo. 665, 157 S.W. 790; Curtis v. Albee, 167, N.Y. 360, 60 N.E. 660. A mistake as to the existing situation, which leads either one or both of the parties to enter into a contract which they would not have entered into had they been apprised of the actual facts, will not justify reformation. It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were.

Mutual mistake justifying reformation "may be defined as error in reducing the concurring intentions of the parties to writing" Naisbitt v. Hodges, supra at 623. It is not sufficient to prove only a misapprehension of

the facts. Giving Appellants the benefit of all inferences, all that the trier of facts in the instant case could possibly infer from the evidence is that the parties intended the Schneiters to receive 41-1/2 shares of Savage's stock, and Cosgriff to receive 41-1/2 shares in the expectation that thereby each family would own one-half of the stock of the corporation. The trier of fact could have inferred, and did, that the parties were speaking without regard to exactitude but were satisfied with approximate equality. Such a record does not reflect the clear, definite and convincing evidence required. Moreover, it is, as a matter of law, giving Appellants the benefit of all inferences, not such evidence as shows mutual mistakes justifying reformation.

The trial court correctly ruled that Appellants' counterclaim for reformation be dismissed with prejudice. This Court should affirm.

IV. THE EXCLUDED EVIDENCE WAS CORRECTLY EXCLUDED.

During the trial the court excluded certain documents, of which Appellants now complain. (Ex. 15, App.'s Br. 6; Ex. 20, App.'s Br. 11). Those documents do not tend to establish any of the elements of a cause of action for reformation. Individually, or in the aggregate, they either tend to show a careless use of language, the propensity of us all to speak in approximations, or a belief that a different result would

be or was achieved by dividing Savage's stock 41-1/2 shares to each family. Their exclusion was thus not prejudicial.

V. APPELLANTS' ESTOPPEL ARGUMENT MERELY RAISES ISSUES OF CREDIBILITY WHICH WERE RESOLVED AGAINST APPELLANTS BELOW.

In Point II of their brief, Appellants assert that the trial court should have found an estoppel that barred plaintiffs' claim. This argument merely raises questions of credibility, especially the credibility of Schneiter, Jr. For instance on pp. 16 and 17 of their brief, Appellants cite as record support for their assertions the testimony of Schneiter, Jr. Obviously, the trial court chose not to believe this testimony. Some of it is inherently incredible, such as the testimony by Schneiter that Mr. Cosgriff intended to give his valuable investment to the Schneiters. (R. 167, 169, 197). As Appellants concede much of it is disputed by the testimony of other witnesses. (App.'s Br. at 17, fn. 8. See also R. 238-240 for additional rebuttal testimony.) The essential element of Appellants' estoppel argument is that the Respondents long acquiesced in Appellants' claim to equal ownership. However, there is ample testimony that only in 1975 did the Cosgriff interests learn that the Schneiters asserted equal ownership, knowledge which quickly precipitated this suit. (R. 111-112, 121-122, 127, 130-131).

Not only is the testimony of Schneiter disputed but Schneiter was shown to be unreliable. He obliterated the stock record book so as to cast confusion about the number of shares owned by him. He improperly changed the financial records so as to reflect an additional share of stock in his name.

It is, therefore, not surprising or inappropriate that the trier of the facts, who had a chance to observe Schneiter, Jr. on the stand, chose to disbelieve him. Issues of credibility are appropriately lodged with the trier of facts, not an appellate court. Filmore City v. Reeve, 571 P.2d 1316, 1318 (Utah 1977).

Schneiter's testimony as to reliance is equally suspect. He conceded that his involvement with Lake Hills afforded him, in addition to the cash salary and 50 lots concededly paid him, numerous opportunities for profit, such as operation of a golfing-goods store on the premises, a driving range concession on the premises, and golf cart rental on the premises (R. 201-206).[9/] He also had the opportunity to oversee his family investment and thereby make himself a rich man through the appreciation of his stock.

9/ He also testified he was actively pursuing other business enterprises in Utah during the period (R. 199).

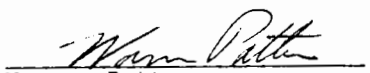
Appellants' evidence of estoppel is not only disputed by other more credible witnesses but it also is internally inconsistent in that there existed ample reasons for him to devote his time to Lake Hills even as a minority shareholder. Appellants have failed to carry this defense by a prepondurance of the evidence. Accordingly, the Court should affirm the judgment.

CONCLUSION

As stated earlier, this appeal presents this Court with an example of the salutory purposes of the requirement for clear, definite and convincing evidence in a suit for reformation. Appellants seek to reform a contract over 20 years old when all the principal actors are long dead, relying solely upon ambiguous evidence susceptible to two rational inferences. It is precisely this type of evidence that the rule is designed to defeat. Accordingly, the Court should affirm the judgment below in all respect.

Respectfully submitted,

FABIAN & CLENDENIN



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CERTIFICATE OF MAIL

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Respondents to Thomas A. Quinn and Kent H. Murdock, 400 Deseret Building, Salt Lake City, Utah 84111, Attorneys for Appellants postage prepaid on this 13th day of March , 1979.

Nila Mayfield